No. 82-1271

In the Supreme Court of the United States

OCTOBER TERM, 1983

IMMIGRATION AND NATURALIZATION SERVICE, ET AL., PETITIONERS

v.

HERMAN DELGADO, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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1. The briefs of respondents and amici are replete with hyperbole heralding the arrival of a police state, but noticeably short on providing a reasoned analysis, based on concrete facts, that would explain how INS factory surveys such as those involved in this case result in anything resembling a Fourth Amendment violation (except in the abstract sense in which the court of appeals concluded that the entire workforce was "seized" for the duration of the surveys without a particularized suspicion of illegality with respect to each worker who happened to be present on the premises). We submit, however, that the Fourth Amendment issues presented in this case cannot be answered by engaging in this type of rhetorical characterization. Indeed, the specific question for decision is whether *respondents'* rights were violated by the INS agents' actions at the factories where they were employed. Accordingly, the best way to

evaluate respondents' Fourth Amendment claims is to focus on the facts as they relate to respondents. It is our submission that a careful examination of these facts will reveal that the INS factory survey procedures challenged here are permissible under the Fourth Amendment.

In support of their assertion that they were "seized" within the meaning of the Fourth Amendment for the duration of the surveys, respondents rely (Br. 15-20) on general characterizations of the surveys as involving, *e.g.*, the "sealing" of the exits and resultant "capture" of the workers, "a massive show of police force" by INS agents who proceeded down the aisles "in para-military formation." Respondents' self-serving characterizations of the surveys, however, are belied by the record, which, as we pointed out in our opening brief (at 8-9, 23, 33), demonstrates that, in fact, respondents themselves moved freely about inside the factories during the surveys and exited the factories in some instances, without being stopped or otherwise subjected to restraint by the INS agents, and that, in their brief contacts with INS officers, respondents were simply asked one or two courteous questions about their immigration status and (in the case of Labonte and Miramontes) were requested to produce the appropriate documentation when they admitted to being aliens.

Even though the record shows that none of the respondents was prevented from leaving the factories during the surveys,[1] respondents point to several factors which, they

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[1]Contrary to respondents' assertions (Br. 10 n.16, 11 n.20), the record supports our contention that Delgado and Labonte exited the factory premises during the September 1977 survey at Davis Pleating (see J.A. 98-99, 135-137). Although respondent Miramontes did not attempt to leave the factory during the survey at Mr. Pleat, there is no reason to believe that she would have been prevented from doing so. Respondents nevertheless rely (Br. 19-20) on Miramontes' statement (J.A. 127) that she feared the INS agents would think she had no papers and would

contend, establish that they reasonably *could* have believed that they were not free to leave. This claim does not withstand analysis.

First, respondents assert (Br. 16) that workers enjoy a substantial right to privacy in the workplace, so that police conduct that would amount to no more than mere questioning in a public place would constitute a seizure if it occurred at a person's place of work. We submit that a person who works in a factory alongside 200 to 300 other employees can have little, if any, reasonable expectations of privacy there. Although the *owner* of commercial premises may object to a *search* of those premises (see, *e.g.*, *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 312-313 (1978)), and an employee may also raise a Fourth Amendment objection to the search of his office in certain circumstances (see *Mancusi* v. *DeForte*, 392 U.S. 364, 369-370 (1968)), this case presents no question regarding a search of commercial premises (or of respondents, for that matter). Respondents have provided no authority to support their claim that a person has a greater

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shoot her if she attempted to leave. But Miramontes' wholly irrational fear is not an adequate basis for concluding that respondents reasonably believed they were not free to leave the factories in the course of the surveys. And, of course, if as she apparently at first feared, Miramontes was not carrying her papers (see Resp. Br. 10-11 & n.18), she would have been subject to lawful arrest on that account. Respondents' reliance (Br. 11 n.20) on another incident in which an INS agent followed an unknown worker who left a factory during a survey also does not support their claim that they were not free to leave: notably, the worker was not prevented from leaving; it is settled that no search or seizure occurs when law enforcement officers simply follow a suspect for surveillance purposes (see *United States* v. *Knotts*, No. 81-1802 (Mar. 2, 1983)). In fact respondents have misstated the agent's testimony, which was (J.A. 158) that the "person just c[a]me running out of the location * * * toward the parking lot where there was some vehicles parked * * *." An INS agent would surely have a reasonable suspicion that a worker who runs out of a factory during a survey is an illegal alien. The described conduct of the agent thus reflects greater self-restraint than the Fourth Amendment requires.

right to be free of questioning from government agents in his place of work where, as here, the agents are lawfully present on the premises (pursuant to a warrant or the owner's consent) than in a public place. Respondents' suggestion (Br. 16) that an employee might feel reluctant to leave his work station because of his obligations to his employer simply reinforces the submission in our opening brief (at 22-23) that the "freedom" of an employee to leave is more theoretical than real in this context and that respondents therefore cannot contend that they were seized in any meaningful sense merely because INS agents conducted surveys at their places of employment.

Respondents (Br. 12, 16) and amici (MALDEF Br. 10) also suggest that the INS chooses to conduct surveys at places of employment in order to create the impression that workers who attempt to leave will be acting contrary to the wishes of their employer. This suggestion is both incorrect and unsupported by the record. The INS conducts factory surveys in industries that are known to employ large numbers of illegal aliens for a number of reasons. First, such surveys have a high success rate—as borne out by the percentage of illegal aliens discovered in the workforce during the surveys at issue here—so that the surveys are a reasonable allocation of INS's limited investigative resources. In the two surveys at Davis Pleating, the INS agents found that illegal aliens comprised more than 25% and almost 20% of the workforce, respectively; the survey at Mr. Pleat disclosed that 50% of the employees were illegal aliens. Second, because many illegal aliens are drawn to this country by the prospect of finding employment, and because it is unlawful for a documented nonimmigrant alien to work without authorization (see 8 C.F.R. 214.1(e)), checking the workplace for violations of these and other immigration laws is an integral aspect of INS's enforcement mission. Finally, the workplace is one of the least intrusive

settings in which to conduct an effective immigration enforcement program. Clearly, it is far less intrusive to carry out surveys in the setting of a large factory than in other settings, such as residential locations.

Another factor cited by respondents (Br. 16-17) as creating the perception that the workers are not free to leave —one that was critical to the court of appeals' analysis — is the stationing of agents at the doors. But, as we explained in our opening brief (at 6 & n.6, 23), it should be readily apparent to the reasonable citizen or lawful resident worker that the agents are positioned at the doors not to prevent all the employees from leaving, but only to apprehend those attempting to flee, as to whom the agents have a reasonable suspicion of illegal alienage. Respondents nevertheless assert (Br. 19 n.25) that each worker in a surveyed factory is detained until he answers the agent's questions concerning his immigration status. Similarly, amici maintain (MALDEF Br. 10-11) that, before being allowed to exit a factory during a survey, an employee would be forced to respond to any questions posed by INS agents, and that a failure to respond might result in detention of the employee. Based on these assertions, respondents and amici contend that all workers, including citizens and lawful resident aliens, are seized during the surveys. This contention fails because its premise is erroneous. As a factual matter, none of respondents was hampered in his movements during the surveys. Indeed, the record shows that neither Delgado nor Labonte was detained or required to respond to questions when they went outside in the course of one of the surveys (J.A. 98, 135-137). Moreover, as a policy matter, INS specifically instructs each of its agents that, in order to detain an individual for inquiry into his right to enter or remain in the United States, the agent must have a reasonable suspicion that the individual is an illegal alien (J.A. 41). Thus, although we contend that a reasonable suspicion of alienage

is sufficient under the Fourth Amendment to support a brief detention in this context, the reality of the situation is that, pursuant to INS guidelines, an agent will not stop a person from exiting a factory in the course of a survey unless the agent reasonably suspects that the person is in this country illegally.

Respondents also rely (Br. 17) on the agents' "trappings of authority," including badges, handcuffs and walkie-talkies, as creating a "detentive environment." [2] Although the Court has suggested that the fact that an officer is not in uniform may help support a finding that his encounter with a person is not a seizure (see *United States* v. *Mendenhall*, 446 U.S. 544, 555 (1980) (opinion of Stewart, J.)), it does not follow that the display of a badge for identification purposes by an officer who is not in uniform, or the presence of other official equipment, necessarily converts an encounter into a seizure.[3] Similarly, the fact, also cited by respondents (Br. 18), that the agents did not affirmatively

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[2]Although respondents correctly note (Br. 4) that INS agents are armed, the agents are instructed to keep their weapons concealed (Smith Dep. 111; Clarin Dep. 109), and there is no evidence that any weapons were visible to the workers (see J.A. 83, 88, 95, 112). The agents also carry flashlights for the purpose of locating illegal aliens who attempt to hide, but, contrary to respondents' assertion (Br. 4), the agents are not trained to use the flashlights as batons (Rice Dep. 8).

[3]Respondents suggest (Br. 11 & n.18) that Miramontes felt compelled to cooperate with the INS agents because, if she had refused or been unable to produce her immigration papers, she would have been subject to arrest pursuant to 8 U.S.C. 1304(e). The requirement that Miramontes produce her immigration documents upon a proper request was a condition of her being admitted to this country as an alien. That condition was imposed by Congress in the exercise of its plenary powers over immigration. We note that respondents do not make any claim that this statutory requirement violates the Fourth Amendment. Miramontes' asserted fear that she might have been arrested if she had given the agents probable cause to do so hardly establishes a Fourth Amendment violation.

inform the workers that they were free to leave is not dispositive, since this Court has never suggested that such an announcement is legally required. In this regard, respondents' contention that the workers are unaware of the purpose of the agents' appearance inside the factory because no general announcement is made at the outset of the survey seems to us fundamentally inconsistent with respondents' assertion that the agents' presence is almost invariably accompanied by screams of "la migra" and the efforts of illegal aliens to flee or hide.

Respondents also contend (Br. 20) that, because some workers become nervous and most workers stop performing their work during the surveys, it follows that all of the workers are seized.[4] But the subjective reactions of some workers do not transform the surveys into seizures. If INS agents with arrest warrants naming specific workers entered factories to seize those workers, it is quite likely that some of the other workers present might become nervous and stop working while the arrests were in progress. It would not follow, however, that those workers would be considered to have been seized within the meaning of the Fourth Amendment.

Respondents claim (Br. 19) that, unlike a typical *Terry* stop, in which an individual is detained for a relatively brief period, workers in a surveyed factory are detained for up to

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[4]Contrary to respondents' assertion (Br. 10 n.17, 20), Correa did not testify that she was personally afraid of the INS agents; rather, she claimed that other, unidentified workers reacted with fear to the surveys, although she admitted that lawful resident aliens "don't have anything to fear" (J.A. 116). Moreover, while it is possible that INS agents may mistakenly detain a lawful resident alien during a survey (see Resp. Br. 18, 20), as respondent Correa recognized, that possibility provides no objective basis for all lawfully resident workers to fear the agents. In reality, law enforcement agents sometimes do make mistakes, even when executing valid arrest warrants for named individuals; that fact, however, does not justify eliminating the power of arrest.

one or two hours. But this claim simply begs the question whether the workers are in fact "detained" at all; it is our submission that they are not. In any event, even if all of the workers may be subject to a technical "seizure" while the surveys are conducted, as we explained in our opening brief (at 25-31), such a seizure is reasonable under the Fourth Amendment. Furthermore, to the extent that workers such as respondents may be detained in the course of their individual encounters with INS agents, these encounters typically last no more than the few seconds necessary for the person to respond to one or two questions about his immigration status and, in the case of a lawful resident alien, to produce immigration documents.[5]

2. a. Respondents (Br. 20-26) and amici (MALDEF Br. 13-17; ACLU Br. 8-39) contend that INS factory surveys are unreasonable under the Fourth Amendment because they result in the indiscriminate seizure of the entire workforce for the duration of the surveys. But, even assuming that the manner in which the surveys are conducted can be said, in some technical sense, to effect a "seizure" of the workforce, respondents and amici simply fail to come to grips with the extreme implications of their position, which are discussed in our opening brief (at 29-31). For example, under their reasoning, it would be unlawful for the police to set up roadblocks to catch fleeing suspects, or to guard the exits of a store to apprehend criminal fugitives. We submit that these law enforcement procedures, as well as the surveys at issue here, pass muster under the principles discussed by this Court in *United States* v. *Martinez-Fuerte*,

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[5]As noted above, under INS guidelines, an agent must have a reasonable suspicion of illegal alienage in order to detain an individual for questioning. Thus, any one of respondents would have been allowed to leave the factory, and would not have been detained to answer questions about his immigration status, so long as the agents had no articulable basis for suspecting that they were in this country illegally.

428 U.S. 543 (1976). Contrary to the contentions of respondents (Br. 24-26) and amici (MALDEF Br. 14-15; ACLU Br. 50-55), the distinctions between this case and *Martinez-Fuerte* are of no constitutional significance.

First, respondents are simply incorrect in asserting (Br. 24) that the checkpoints in *Martinez-Fuerte* were the functional equivalent of the border; if such were the case, the Court undoubtedly would have based its decision on traditional border search principles. Indeed, in *United States* v. *Ortiz*, 422 U.S. 891 (1975), in which the Court earlier had held that automobile searches at one of the checkpoints involved in *Martinez-Fuerte* violated the Fourth Amendment in the absence of probable cause or consent, the Court specifically noted that the government did not contend that the checkpoint was the functional equivalent of the border. Second, while the Court in *Martinez-Fuerte* (428 U.S. at 561) made reference to the differences in an individual's expectations of privacy in an automobile as compared to in his house, this case—which involves no search issues—does not implicate privacy interests to any significant degree. For this reason, respondents' reliance (Br. 26) on *Ortiz*, which was a search case, is unavailing. Third, as we noted in our opening brief (at 28-29), although a traveler familiar with the highway in *Martinez-Fuerte* would not be surprised to come upon the checkpoint, he could not anticipate being selected for secondary referral, a process that involves from three to five minutes of questioning and that need not be based on any articulable grounds. While the workers in a surveyed factory do not have advance notice of a survey,[6]

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[6]Respondents suggest (Br. 3) that the INS selects factories to be surveyed on a "random[]" basis. This is incorrect. In those cases in which a warrant is obtained, a magistrate determines that there is probable cause to believe that illegal aliens will be found on the premises. As a practical matter, given the INS's scarce enforcement resources, the INS will not send its agents into the field to conduct a factory

any detention of an individual worker for questioning about his immigration status is extremely brief and is not "indiscriminate" because it must be based, at a minimum, on a reasonable suspicion of alienage.

b. Respondents (Br. 26-31) and amici (MALDEF Br. 20-21; ACLU Br. 57-59) maintain that any detention of employees during factory surveys is unreasonable because the governmental interests served by factory surveys are insubstantial. This assertion is untenable.

Respondents attempt to differentiate between enforcement of the immigration laws at the border and away from the border, and they suggest (Br. 28-29) that the nation's immigration problems would best be addressed by prohibiting employment of undocumented workers and increasing enforcement efforts along the border. To begin with, the INS is charged with enforcing the immigration laws not only at the border, but throughout the United States. In order to carry out this task, the INS conducts enforcement operations in a variety of settings, including points along the border, fixed checkpoints, and urban areas where large numbers of illegal aliens are known to settle. While it is true that the operations at the border are the most effective, that does not diminish the effectiveness of conducting surveys in factories where the workforce is reasonably believed to contain a high concentration of illegal aliens. Indeed, to the extent that foreigners contemplating illegal entry into the United States are led to expect that, once they avoid the Border Patrol they may secure employment with little or no fear of being discovered, the problems of enforcement at the

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survey without a clear indication that the factory employs a significant number of illegal aliens. Thus, even in cases in which entry is accomplished without a warrant but pursuant to the owner's consent, the factory is selected on the basis of objective criteria establishing reasonable suspicion, if not probable cause, that illegal aliens will be found there.

border will be made that much more difficult. Moreover, the decisions whether to prohibit the employment of illegal aliens or to allocate greater resources to border enforcement are policy matters for Congress, and are not before this Court.

Pointing to a so-called "revolving door effect," respondents argue (Br. 28, 30) that the Court should not approve factory surveys because some of the illegal aliens apprehended in such surveys invariably return to this country and take up their old jobs. This, we submit, is a preposterous argument; it is tantamount to saying that the Court should restrict the government's efforts to enforce the law because it can be predicted that some of those apprehended will violate the law again. In this regard, it is important to recognize that "the thousands of members of our community who have been uprooted as a result of the surveys," to whom respondents refer (Br. 30), are illegal aliens who have no legal right to remain in this country and who, accordingly, have been deported or permitted to leave voluntarily under the threat of deportation.

3. Respondents (Br. 31-33) and amici (MALDEF Br. 13; ACLU Br. 55 n.30) contend that this Court's decisions in *United States* v. *Brignoni-Ponce*, 422 U.S. 873 (1975), and *United States* v. *Cortez*, 449 U.S. 411 (1981), compel the conclusion that INS agents may not stop and question a person about his immigration status unless they have a particularized reasonable suspicion of illegal alienage with respect to that person. Accordingly, they argue that the individual encounters between INS agents and workers during factory surveys constitute unlawful seizures because it is conceded that the agents do not have reasonable suspicion of illegal alienage with respect to every worker questioned in the course of a survey. In our opening brief (at 34-35), we argued that these encounters do not involve a seizure at all, and thus are not subject to the Fourth

Amendment. Even if the encounters may be viewed as seizures, however, for the reasons stated in our opening brief (at 34-44), respondents and amici err in contending that they must be supported by a reasonable suspicion of illegal alienage with respect to each individual encountered.

Moreover, respondents' and amici's reliance on *Brignoni-Ponce* and *Cortez* is misplaced. As respondents themselves acknowledge, the Court in *Brignoni-Ponce* (422 U.S. at 884 n.9) specifically reserved the question whether, outside the automobile context, INS officers "may stop persons reasonably believed to be aliens when there is no reason to believe they are illegally in the country." Contrary to respondents' assertion, the decision in *Cortez* did not answer the question reserved in *Brignoni-Ponce*. The specific question under consideration in *Cortez* was "whether objective facts and circumstantial evidence suggesting that a particular vehicle is involved in criminal activity may provide a sufficient basis to justify an investigative stop of that vehicle." 449 U.S. at 412-413. In answering that question in the affirmative, the Court cited some of its prior cases, including *Brignoni-Ponce*, for the proposition that, in the context of a criminal investigation, an investigatory stop must be founded upon a reasonable suspicion that the person stopped is engaged in criminal activity. 449 U.S. at 417-418. But because *Cortez*, like *Brignoni-Ponce*, involved a stop of a vehicle undertaken as part of an investigation into criminal activity (smuggling of illegal aliens), the Court in *Cortez* had no reason to focus specifically on the question left open in *Brignoni-Ponce* — *i.e.*, the permissibility of stopping a suspected alien for purposes of inquiring into his immigration status as part of a noncriminal enforcement program in a pervasively regulated area. In an analogous context, the Court has held that administrative searches and seizures of highly regulated businesses need not be

justified by information concerning criminality. Accordingly, the decision in *Cortez* cannot be viewed as having settled the question reserved in *Brignoni-Ponce*.

Respondents (Br. 33-35) and amici (MALDEF Br. 4-5, 23-24) assert that a reasonable suspicion of alienage alone, without a requirement of illegal alienage, would result in unlawful detentions of individuals for questioning because the only objective criterion on which such encounters would be based is ethnic physical appearance, which this Court has held is insufficient to justify an investigative detention. See *United States* v. *Brignoni-Ponce*, 422 U.S. at 886. Accordingly, respondents and amici contend that an alienage standard would lead to discrimination against citizens and resident aliens of Hispanic orgin. This contention is without merit.[7]

In the first place, although ethnic physical appearance is *one* factor, among others, that an INS agent is instructed to consider in determining whether he has a reasonable suspicion that a particular person is an alien, the INS specifically informs its officers that ethnic appearance is not enough, standing alone, to satisfy that standard. See J.A. 37-38. Thus, under INS guidelines, the officer must look to other particular characteristics or circumstances (such as foreign manner of dress or grooming and apparent inability to speak English) that give rise to a reasonable suspicion of alienage. Moreover, the factors listed in the INS guidelines are to be viewed together and not in isolation (see *United States* v. *Cortez, supra*), and they are, in any case, merely illustrative and not exhaustive.

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[7]We note that respondents (Br. 42-43) and amici (MALDEF Br. 25-29) also argue that the factory surveys are conducted in a manner that violates the equal protection component of the Due Process Clause of the Fifth Amendment. Neither the court of appeals nor the district court addressed this issue, which was not litigated below (Pet. App. 7a-8a n.7), and the argument appears to be insubstantial in any event.

Furthermore, it is difficult, if not impossible, in our view, to determine in the abstract whether a particular set of factors may serve as a proper basis for stopping and questioning an individual about his right to be or to remain in the United States. The record in this case does not focus on the agents' grounds for questioning any particular person regarding his immigration status. As the court of appeals noted (Pet. App. 41a), any determination whether the appropriate standard for detaining an individual has been met presents essentially "a factual question to be resolved on a case-by-case basis." Therefore, we submit that the question whether an agent is capable of making a proper reasonable suspicion-of-alienage determination should await a case that presents that question in the focused context of a particular encounter.

Nor is there any basis to the claim that an alienage standard in effect would discriminate against citizens and resident aliens of Hispanic ancestry. It is readily apparent that the particular ethnic characteristics that may support a determination of a reasonable suspicion of alienage in a given case will vary, depending on geographic location and the specific nature of the tip. Thus, where the INS receives information about a large concentration of illegal aliens from the West Indies, or Poland, or Nigeria, the agents will focus their investigative efforts on persons exhibiting the ethnic physical appearance, language, dress and other characteristics of the particular ethnic group involved. In short, there is no danger that an alienage standard, as such, would result in unwarranted discrimination against any particular racial or ethnic group.

4. Respondents (Br. 38-40) and amici (MALDEF Br. 13-16; ACLU Br. 29-38) appear to contend that a number of this Court's decisions establish that the Fourth Amendment

imposes an irreducible requirement of individualized suspicion. This Court held precisely to the contrary in *Martinez-Fuerte*, however, and the cases relied upon by respondents and amici do not support their position.

The issue presented in *Ybarra* v. *Illinois*, 444 U.S. 85 (1979), concerned the permissibility of the *search* of a patron of a public tavern by police officers executing a search warrant at the tavern. As this Court noted in *Michigan* v. *Summers*, 452 U.S. 692, 695-696 n.4 (1981), "[n]o question concerning the legitimacy of the detention was raised. Rather, the Court concluded that the search of Ybarra was invalid because the police had no reason to believe he had any special connection with the premises, and the police had no other basis for suspecting that he was armed or in possession of contraband." Here, as in *Summers*, only the detention is at issue.[8]

This Court's decision in *Brown* v. *Texas*, 443 U.S. 47 (1979), is clearly inapposite. There, the police stopped and frisked an individual in a public alley on the ground that he "looked suspicious" and had never before been seen in the area, which was known as having a high incidence of drug traffic. *Brown*, and other cases involving stops of single individuals in public places, simply did not address the issue posed here, which is whether law enforcement officers may detain a group of individuals in a particular location when they have a reasonable suspicion that a substantial percentage of the individuals in that group are engaged in criminal conduct.[9] As we argued in our opening brief (at 40-44),

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[8] *Sibron* v. *New York*, 392 U.S. 40, 62-63 (1968), and *United States* v. *Di Re*, 332 U.S. 581 (1948), also are not on point because they too involved searches, rather than mere detentions, of suspected individuals.

[9] *Davis* v. *Mississippi*, 394 U.S. 721 (1969), is also inapposite for similar reasons. In that case, based on a rape victim's description of her assailant as a black youth, police rounded up at least 24 black youths

there is no reason why the basis for suspicion must be "individualized" in the latter context.

For the foregoing reasons and those stated in our opening brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.

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and brought them to police headquarters for questioning and fingerprinting. The investigatory detentions, which were unsupported by reasonable suspicion, let alone probable cause, were clearly unlawful. But *Davis*, like *Brown*, involved the actual seizures of single individuals, rather than the constructive or hypothetical detention at a single location of a discrete group, some unidentified members of which are reasonably suspected of criminal activity.

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